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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHARLES P. BLUTH

Appeal 2014-001513
Application 12/407,657¹
Technology Center 3600

Before JOSEPH A. FISCHETTI, NINA L. MEDLOCK, and
CYNTHIA L. MURPHY, *Administrative Patent Judges*.

FISCHETTI, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134 of the Examiner's final rejection of claims 21–40. We have jurisdiction under 35 U.S.C. § 6(b).

SUMMARY OF DECISION

We AFFIRM-IN-PART.

¹ Appellant identifies Computerized Screening, Inc. as the real party in interest. Appeal Br. 1.

THE INVENTION

Appellant's claims are directed to community based managed health kiosks and prescription drug dispensing systems, and more particularly to facilitating automated drug dispensement by a kiosk system following authorization by a remotely located health care professional monitoring a patient via the kiosk system. Spec. 2.

Claim 21 reproduced below, is representative of the subject matter on appeal.

21. A kiosk system for the dispensing of prescription drugs comprising:

- one or more inputs for receiving a one or more pieces of health information from diagnostic devices;

- a real-time communication system operable to communicate with a health care professional remote to a user, the health care professional able to issue prescriptions, the real-time communication system comprising a camera, microphone, speaker, and video screen,

- a privacy mechanism operable to maintain confidentiality of the user's communication with the health care professional;

- a security mechanism comprising one or more of a thumbprint scanner, a signature pad, an access card, a pin, or verification of photo identification, the security mechanism operable to prevent unauthorized access to a personal health record, the personal health record accessible to the user and the health care professional; and

- a drug dispenser configured to dispense a drug upon verification of a prescription from the health care professional, the drug dispenser further configured to dispense a prescribed amount of the drug in a consumer container, the prescription

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based on at least one of the one or more pieces of health information and real-time communication with the user.

THE REJECTION

The Examiner relies upon the following as evidence of unpatentability:

Asahioka	US 5,075,850	Dec. 24, 1991
Graft, III	US 5,278,753	Jan. 11, 1994
Hoyt	US 6,085,195	July 4, 2000
Rosenblum	US 2005/0049746 A1	Mar. 3, 2005
Squilla	US 2006/0106646 A1	May 18, 2006

The following rejections are before us for review:

Claims 31–34 are rejected under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter.

Claims 21, 22, and 24–29 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenblum in view of Squilla.

Claims 23 and 30 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenblum in view of Squilla, and further in view of Official Notice.

Claims 31–34 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Squilla in view of Rosenblum.

Claims 35, 39, and 40 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenblum in view of Squilla, and further in view of Graft, III.

Claim 36 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenblum in view of Squilla, in view of Graft, III, and further in view of Asahioka.

Claims 37 and 38 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Rosenblum in view of Squilla, in view of Graft, III, and further in view of Hoyt.

FINDINGS OF FACT

1. We adopt the Examiner's findings as set forth on pages 3–10 of the Answer, excluding those findings made for claims 35-40.

2. Rosenblum discloses

One option includes a telephone 3980 on the dispenser to allow the user to speak with the central control and call center to discuss any insurance problems, for example. The telephone can also allow a remote pharmacist or other health care provider to ask or answer any questions by the user.

Para. 66.

3. Rosenblum discloses “The pharmacy service provider 9006 then enters data about the prescription into a data input device 9008 that relays the data to a medication dispensing machine 9010, for example, any one of the embodiments described with respect to FIGS. 1-30 hereinabove.”

Para. 197.

4. Figure 11 of Rosenblum, below, shows a remote dispenser.

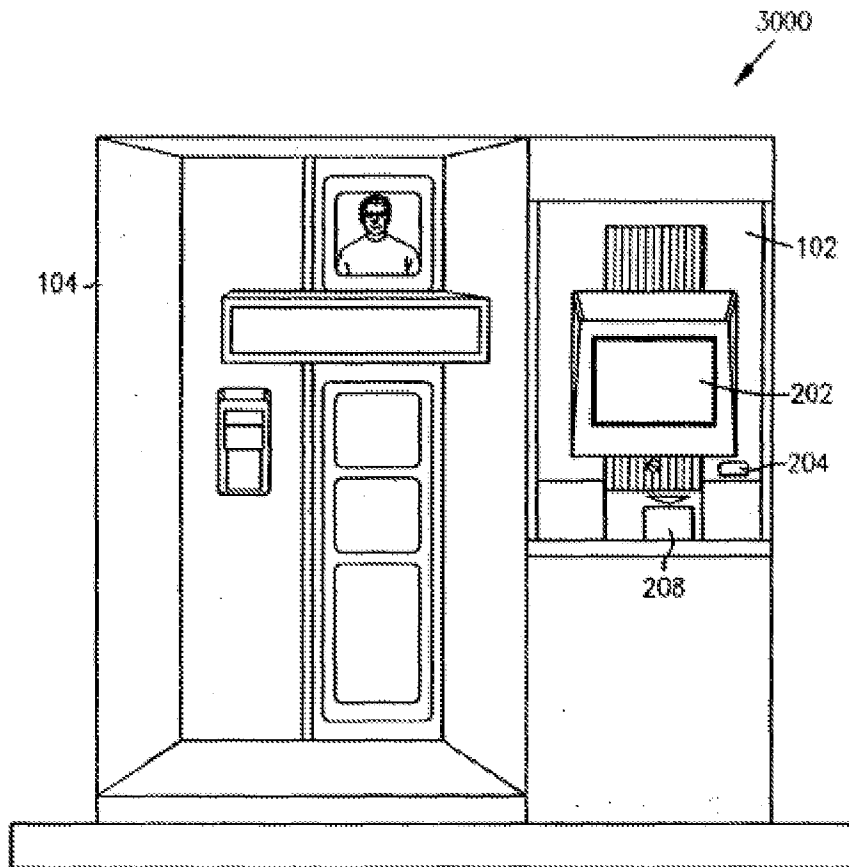


FIG. 11

Figure 11 of Rosenblum showing a remote dispenser is shown above.

5. Rosenblum discloses that the remote dispenser of Figure 11, above, includes:

The control module 102 houses subsystems that provide the interface between the remote dispenser 3000 and the medical patient. These components include a 17 inch Monitor with touch screen 202, a credit card reader 204, a prescriptions/instructions/receipts printer 206, a prescription/

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instructions/receipt output slot 208, an internal waste slot/waste basket 210, speakers 212, and a controller PC 214.

Para 126.

6. Rosenblum discloses: “Dispensing machine 9110 may be, in one example embodiment, of the kind described above in FIGS. 1-30.”

Para. 210.

ANALYSIS

35 U.S.C. § 101 Rejection

We will not sustain the rejection of claims 31–34 under 35 U.S.C. § 101.

The Supreme Court

set forth a framework for distinguishing patents that claim laws of nature, natural phenomena, and abstract ideas from those that claim patent-eligible applications of those concepts. First, . . . determine whether the claims at issue are directed to one of those patent-ineligible concepts. If so, we then ask, “[w]hat else is there in the claims before us?” To answer that question, . . . consider the elements of each claim both individually and “as an ordered combination” to determine whether the additional elements “transform the nature of the claim” into a patent-eligible application. [The Court] described step two of this analysis as a search for an “‘inventive concept’”—*i.e.*, an element or combination of elements that is “sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself.”

Alice Corp., Pty. Ltd. v. CLS Bank Int’l, 134 S. Ct. 2347, 2355 (2014) (citations omitted) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012)).

Thus, to perform this test, we must first determine whether the claims at issue are directed to an abstract idea. If the claims are not directed to an abstract idea, the inquiry ends.

We find that the rejected claims are not directed to an abstract idea. Claim 31 requires, *inter alia*, receiving one or more pieces of diagnostic information from a user of *a kiosk system*; transmitting *audio and video*, by a *real-time communication system*; receiving a prescription for a drug, the prescription issued by the health care professional based on the personal health record, the one or more pieces of diagnostic information, and the *audio and video* from the user. We, thus, find that, when considered as a whole, claim 31 is directed to a technological improvement for using a managed health system to fill prescriptions by using, *inter alia*, a kiosk, audio and video signals, and a real time communication system. *See McRO, Inc. v. Bandai Namco Games America, Inc.*, 837 F.3d 1299 (Fed. Cir. 2016) (quoting *Internet Patents Corp. v. Active Network, Inc.*, 790 F.3d 1343, 1346 (Fed. Cir. 2015)).

Claim 21

The Appellant argued independent claim 21, and dependent claims 22 and 24–29 as a group. (Appeal Br. 8). Thus, claim 21 is the representative claim for this group, and the remaining claims stand or fall with claim 21. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2015).

Appellant argues, “Rosenblum, however, appears to disclose that prescriptions are written upon an in-person examination of a patient by a physician.” (Appeal Br. 9). The Appellant further argues,

As noted, the above reference appears to disclose a dispensing machine located remotely to a prescribing medical service provider. This is not the same as the subject matter of claim 21, which recites “a health care professional remote to a user” and “[dispensing] a drug upon verification of a prescription from the health care professional...the prescription based on at least one of the one or more pieces of health information and real-time communication with the user.”

(Appeal Br. 11).

The Examiner found that the real-time communication system for remote communication with a health care professional is disclosed by Rosenblum at “para. 66, 126, 221, and Fig. 11.” (Answer 4).

We agree with the Examiner’s finding because paragraph 66 of Rosenblum explicitly discloses, “[t]he telephone can also allow a remote pharmacist *or other health care provider* to ask or answer any questions by the user (emphasis added).” (FF. 2).

Appellant further argues

[The] prescription writing module is not the same as a kiosk, and a prescription is not the same as health information from diagnostic devices - a prescription is instead a consequence of making a diagnoses based on diagnostic information and developing a treatment plan. Accordingly, the cited portion of Rosenblum does not appear to disclose the claimed subject matter involving “a kiosk with one or more inputs for receiving a one or more pieces of health information from diagnostic devices.”

(Appeal Br. 12–13).

The Examiner found that,

[T]he Rosenblum reference teaches a kiosk with a medical service provider prescribing a medication for a patient and a dispensing machine located remotely from the location of the prescribing medical service provider (see para. 197 and Figs. 11-12 of Rosenblum).

(Answer 17).

We disagree with Appellant. Appellant’s Specification does not specifically define the term “kiosk;” nor does it utilize the term “contrary” to its customary meaning. The ordinary and customary definition of the term “kiosk” is: “a small stand-alone device providing information and services on a computer screen.”² According to Rosenblum, the dispensing machine 9010 may be part of any one of the embodiments shown in Figures 1–30. (FF. 3, 6). We find that the device shown in Figure 11 meets the definition of a kiosk because it includes a computer screen on which the pharmacist information is presented. (FF. 2–5). We further find no error with a finding that a prescription is a piece of information from a diagnostic device because prescriptions ultimately are derived from information derived from a diagnostic device, e.g., a statin prescribed from (as a result of) a CAT scan of the heart.

Appellant next argues that:

The above portion of Rosenblum appears to disclose a virtual private network. This is not the same as the subject matter of

² <https://www.merriam-webster.com/dictionary/kiosk> (last visited 1/17/2017)

claim 21, at least because VPN network security does not address the audio or visual aspects of confidentiality discussed above. Even if a VPN were utilized to encrypt network transmissions emanating from the kiosk, the user's verbal communications would still be subject to surveillance.

(Appeal Br. 13; *see also* Reply Br. 2–3).

We disagree with Appellant. Claim 21 only requires a privacy mechanism operable to maintain confidentiality of the user's communication with the health care professional. To the extent that the hardware supporting the VPN is considered to be a mechanism, we find no error with the Examiner's use of the VPN to meet the limitation because the claim does not distinguish the type of information being protected. Notwithstanding, we find that the device shown in Figure 11 inherently includes a privacy mechanism at the cabinet module 104, which is recessed into the device. (FF. 4, 5). "It is well settled that a prior art reference may anticipate when the claim limitations not expressly found in that reference are nonetheless inherent in it. [...] 'Under the principles of inherency, if the prior art necessarily functions in accordance with, or includes, the claimed limitations, it anticipates.'" *In re Cruciferous Sprout Lit.*, 301 F.3d 1343, 1349, (Fed. Cir. 2002) (citations omitted).

Claim 30

Appellant's challenge to the Official Notice as to the old and well-known use of use an emergency release mechanism is insufficient to establish error with the Examiner's finding because the Appellant has not specifically pointed out the supposed errors in the Examiner's taking of

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Official Notice, “includ[ing] stating why the noticed fact is not considered to be common knowledge or well-known in the art.” *See* 37 CFR § 1.111(b). An adequate traverse must contain adequate information or argument to create on its face a reasonable doubt regarding the circumstances justifying Examiner’s notice of what is well known to one of ordinary skill in the art. *In re Boon*, 439 F.2d 724, 728 (CCPA 1971). That has not been done here. When an Appellant does not seasonably traverse a well-known statement during examination, the object of the well-known statement is taken to be admitted prior art. *In re Chevenard*, 139 F.2d 711 (CCPA 1943).

Independent Claim 31

Appellant argues that “[t]he Examiner cites to ten paragraphs of Squilla as allegedly disclosing these elements of claim 31. However, none of the cited paragraphs appear to be relevant to issuing a prescription.” (Appeal Br. 15, Reply Br. 4).

That argument is not well taken because the Appellant is attacking the Squilla reference individually when the rejection is based on a combination of references, and the Examiner relies on Rosenblum, and not Squilla, as disclosing “dispensing a drug based on the prescription by delivering [(issuing)] the prescribed quantity in a consumer container to the user.” (Final Act. 9; *see In re Keller*, 642 F.2d 413, 426 (CCPA 1981); *In re Young*, 403 F.2d 754, 757–58 (CCPA 1968)).

We also affirm the rejections of dependent claims 32, 33, and 34 because Appellant has not challenged such with any reasonable specificity (see *In re Nielson*, 816 F.2d 1567, 1572 (Fed. Cir. 1987)).

Claims 35, 36, 37, 39 and 40

Concerning independent claim 35, Appellant argues:

Although the cited paragraphs refer to digital cameras, it would be unreasonable to interpret [digital] cameras as constituting “inputs for diagnostic devices,” in light of the plain language of claim 39 and its parent claim 35. First, even if a digital camera were to be considered a diagnostic device, it cannot be both a diagnostic device and an input for a diagnostic device. Second, in parent claim 35 a camera is described as an element of a real-time communication system, not as an input for a diagnostic device.

(Appeal Br. 20–21).

We agree with Appellant. Because claim 35 requires a camera as part of the real-time communication system, the camera cannot then again be used by the Examiner to meet the claim requirement of “one or more input devices configured to receive user input for the health assessment questionnaire.” See *Texas Instr. Inc. v. United States Int’l Trade Comm’n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993) (Claim language cannot be mere surplusage. An express limitation cannot be read out of the claim); *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1563 (Fed. Cir. 1991) (Two distinct claim elements should each be given full effect.).

Even taking the EPR Medical Card 30 in Squilla to be the result of a questionnaire, the data of this card are inputted by a “doctor/specialist 70,

nurse 72, medical assistant 74, clerical assistant 76, or pharmacist 78,” and not the user as required by the claims. (Squilla, para. 48). It is not apparent and the Examiner has not explained why one having ordinary skill in the art would know to allow the patient to enter data otherwise reserved for input by a medical professional.

Accordingly, we will not sustain the rejection of independent claim 35, nor the rejection of claims 36–40,³ which depend therefrom.

CONCLUSIONS OF LAW

We conclude the Examiner did not err in rejecting claims 21–34 under 35 U.S.C. § 103.

We conclude the Examiner did err in rejecting claims 35–40 under 35 U.S.C. § 103.

We conclude the Examiner did err in rejecting claims 31–34 under 35 U.S.C. § 101.

DECISION

The decision of the Examiner to reject claims 21–40 is affirmed-in-part.

³ We note that the additional references cited in the separate rejections of claim 36 using Asahioka, and claims 37 and 38 using Hoyt, respectively, do not remedy the defect in the claim interpretation discussed above concerning claim 35.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART